SUPREME COURT OF THE UNITED STATES.

No. ~~194~~. 81

THE MARINE BANK OF CHICAGO, plaintiff in error,

vs.

THE AGAWAM BANK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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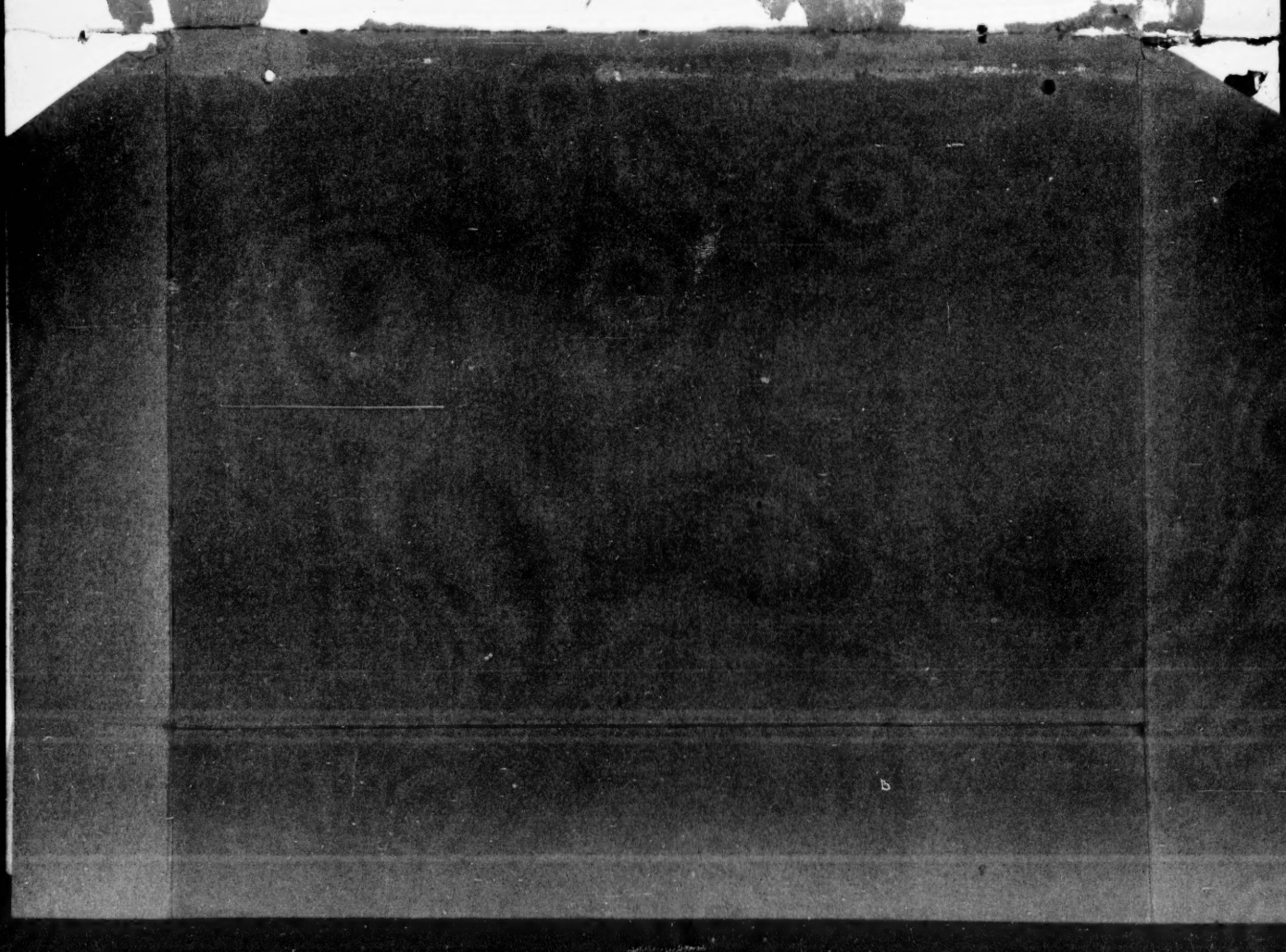

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1 Pleas in the circuit court of the United States of America for the northern district of Illinois, before the Hon. Thomas Drummond, judge of the district court for the district aforesaid, and on Saturday, the fifth day of July, in the year of our Lord one thousand eight hundred and sixty-two, and of the independence of the United States the eighty-seventh year.

WM. H. BRADLEY, *Clerk.*

AGAWAM BANK
vs.
MARINE BANK OF CHICAGO. } Assumpsit.

Be it remembered that on the twenty-first day of January, in the year of our Lord one thousand eight hundred and sixty-two, said plaintiff, by Waite and Towne, attorneys, came into the clerk's
2 office of the circuit court of the United States for the northern district of Illinois, and filed its precipe for summons and bond for costs, in the words and figures following, to wit:

Precipe for summons.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court, March term, A. D. 1862.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE AGAWAM BANK
v.
MARINE BANK OF CHICAGO. } Dam. $10,000.

CHICAGO, *Jan.* 18*th* 1862.

The clerk of said court will issue a summons in the above cause, directed to the sheriff of Cook county, in a plea of trespass on the case on promises, returnable at the February term of said court, A. D. 1862, to the damage of the plaintiff of ten thousand dollars.

WAITE & TOWNE,
Plaintiff's Attorneys.

To WM. H. BRADLEY, Esq., *Clerk.*

Endorsed: Filed Jan. 21, 1862.

WM. H. BRADLEY, *Clerk.*

3 *Bond for costs.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit Court, March term. A. D. 1862.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE AGAWAM BANK
vs.
MARINE BANK OF CHICAGO.

We enter ourselves security, for costs in this cause, and promise to pay all costs which may accrue to the opposite party in thi s action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by it, hereby agree and stipulate that execution may issue against our property for any costs taxed against it.

Dated this eighteenth day of January, A. D. 1862.

H. F. WAITE.

Endorsed: Filed Jan. 21st, 1862.

WM. H. BRADLEY, *Clerk.*

4 And afterwards, to wit, on the 5th day of February, A. D. 1862, the said plaintiff, by its solicitors, came and filed their declaration, in the words and figures following, to wit:

Declaration.

Circuit court of the United States for the seventh circuit, northern district of Illinois, at the March term, A. D. 1862.

UNITED STATES OF AMERICA.
Northern District of Illinois, ss:

The president, directors, and company of the Agawam Bank, a corporation incorporated under and by virtue of the laws of the State of Massachusetts, and doing business in the State of Massachusetts, citizen, and resident of the State of Massachusetts, plaintiff in this suit, by Waite & Towne, its attorney, complain of the Marine Bank of Chicago, a corporation incorporated under and by virtue of the laws of the State of Illinois, citizen of the State of Illinois, and resident of said district, defendant, in a plea of trespass on the case on promises, who is summoned, etc.

For that whereas the said defendant, heretofore, to wit, on
5 the eighteenth day of January, in the year of our Lord one thousand eight hundred and sixty-two, to wit, at the district aforesaid, became and was indebted to the said plaintiff in a

large sum of money, to wit, the sum of ten thousand dollars, of lawful money, for the work and labor, care and diligence, attention and attendance of the said plaintiff, a corporation as aforesaid, by the said plaintiff before that time done, performed, bestowed, and given in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendant, and for the said defendant, and at the special instance and request of said defendant, and also for divers materials and other necessary things by the said plaintiff before that time found, furnished, provided, used, and applied, in and about that work and labor for the said defendant, at the like special instance and request of said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully
6 promised the said plaintiff, well and truly to pay to said plaintiff said sum of money last mentioned, when the said defendant should be hereunto afterwards requested.

And whereas, also, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time done, performed, bestowed, and given other work and labor, care and diligence, attention and attendance of the said plaintiff in and about the goods, chattels, wares, machinery, property, premises, possessions, and business of the said defendant, at the request of said defendant, and had also, at the like special instance and request of said defendant, before that time found, furnished, provided, used, and applied divers other materials and necessary things in and about the said last-mentioned work and labor of the said plaintiff, the said defendant undertook, and then and there faithfully promised the said plaintiff, well and truly to pay to the said plaintiff so much money as the last aforesaid work and labor and materials of said plaintiff, at the time aforesaid, were reasonably worth,
7 when said defendant should be thereunto afterwards requested; and the said plaintiff aver that the same at said time were reasonably worth the further large sum of ten thousand dollars of like lawful money, at the time and place aforesaid, whereof the said defendant afterwards, to wit, at the time and place aforesaid, had notice.

And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, became and was indebted to the said plaintiff in a large sum of money, to wit, the sum of ten thousand dollars of lawful money, for divers goods, wares, and merchandize, by the said plaintiff before that time sold and delivered to the said defendant, and at the special instance and request of the said defendant, and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff, well and truly
8 to pay to the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, sold and delivered to the said defendant divers other goods, wares, and merchandize of the said plaintiff, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandize, at the time of the sale and delivery thereof, were reasonably worth, when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said goods, wares, and merchandize last mentioned, at the time of the sale and delivery thereof, were reasonably worth the further large sum of money, to wit, the sum of ten thousand dollars, of like lawful money aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards,
9 on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, being indebted to the said plaintiff in the further large sum of money, to wit, the sum of ten thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at
10 the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned, when the said defendant should be thereunto afterwards requested.

And whereas, also, the said defendant, afterwards, to wit, on the same day and year, and at the place aforesaid, accounted with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiff in the further large sum of money, to wit, the sum of ten thousand dollars, of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly
11 to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless the said defendant (although often requested, &c.) hath not yet paid the several said sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff of ten thousand dollars, and therefore the said plaintiff brings suit, &c.

WAITE & TOWNE,
Plaintiff's Attorneys.

Copy of instrument and account sued on.

Marine Bank of Chicago to Agawam Bank, Dr.

To collection,	W. B. Keen, Nov. 18	$250	00
"	" Dec. 18	102	07
"	Marsh Bro.'s, Jan'y 16	37	34
"	Bradner & Smith, Jan'y 30	280	21
"	S. C. Griggs, Feb'y 13	1,075	55
"	W. B. Keen, " 18	280	00
"	A. T. Norton, " 25	60	34
12 "	Culver, Page & Hoyne, Feb. 15	325	06
"	W. B. Keen, Feb. 18	102	07
"	Culver, Page & Hoyne, March 3	92	66
"	W. B. Keen, " 18	280	00
"	S. C. Griggs, " 31	59	54
"	Whytel & Newcombe, April 4	345	65
"	Culver, Page & Hoyne, " 12	187	38
"	Benum & Upham, " 14	274	55
"	W. B. Keen, " 18	280	00
"	" " 18	102	07
"	Butler & Hunt, May 1	103	07
"	Culver, Page & Hoyne, May 4	86	40
"	Jones, Perdue & Small	191	96
		4,353	92

Endorsed: Filed Feb. 5, 1862.

W. H. BRADLEY, *Clerk.*

And afterwards, to wit, on the 21st day of February, A. D. 1862, the said defendants, by its attorneys, comes and files their plea, in the words and figures following, to wit:

13 *Plea of defendants.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, March term, A. D. 1862.

THE AGAWAM BANK
vs.
THE MARINE BANK OF CHICAGO. } Assumpsit.

And now comes the said defendant, by McCagg & Fuller, its attorneys, and defends the wrong and injury, when, &c., and says that it

did not undertake or promise in manner and form as the said plaintiff hath above thereof, in its said declaration, complained against it, and of this the said defendant puts itself upon the country, &c.

McCAGG & FULLER,
Deft's Att'ys.

Endorsed: Filed Feb'y 21, 1862.

W. H. BRADLEY, *Cl'k.*

14 And afterwards, to wit, on the 2d day of July, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit:

AGAWAM BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Now, at this day, come the parties, by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit: John Dixon, James M. Whipple, Lewis Harnell, John Parmly, Orville Slusser, John D. Carman, Thomas J. Rudd, Smith McClery, John Stewart, W. W. Carothers, Henry Sloan, and James G. Griffith, who were duly elected, tried, and sworn, and after hearing the evidence and receiving instructions from the court, the jury returned unto the court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and assess its damage to the sum of forty-one hundred and ninety-four dollars. And the defendant, by its attorneys, moves the court for a new trial.

15 And afterwards, to wit, on the 5th day of July, A. D. 1862, in the record of the proceedings of said court in said cause is the following entry, to wit:

AGAWAM BANK
v.
MARINE BANK OF CHICAGO. } Assumpsit.

Now come the parties, by their attorneys, and call up the motion of the defendant heretofore entered, by his attorneys, for a new trial of this cause, when the court overrules said motion.

It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendant the said sum of forty-one hundred and ninety-four dollars, its damages so as aforesaid assessed by the jury, together with its costs by it about its suit in this behalf expended, amounting to the sum of thirty-two dollars and fifty cents, and that it have execution therefor.

16 And afterwards, to wit, on the 5th day of July, A. D. 1862, said defendant, by its attorney, came and filed their bill of exceptions in this behalf, in the words and figures following, to wit:

Bill of exceptions.

In United States circuit court, northern district of Illinois.

THE AGAWAM BANK
v.
THE MARINE BANK OF CHICAGO. } Bill of exceptions.

Be it remembered that on the trial of this cause the plaintiff, to maintain the issue on its part, offered in evidence the account attached to its declaration in this cause, and which is as follows :

Agawam Bank.

1861.				1861.		
Feb.	13	A. F. Norton	$60 34	M'ch 5.	Ex. 6 p. c.	$2 25
		S. C. Griggs & Co	1,075 55	May 23.	" "	2 10
		W. B. Keen, Nov. 17, '60	250 00		" 6	
		Do. Dec. 18, '60	102 07		" 10	
		Marsh Bro., Jan. 16, '61	37 34		" 6	
17						
Feb.	14	S. Bradner & Co., Jan. 31, '61	230 21		Ex. 6 p. c.	
	15	Culver, P. & Hoyne	325 06		" 6	
	18	W. B. Keen	102 07		" 6	
	19	do	250 00		" 6	
M'ch	2	Culver, P. & Hoyne	72 66		" 7	
	18	W. B. Keen	250 00		" 6½	
May	1	Butler & H.	103 07		" 10	
	4	Culver, P. & Hoyne	86 40		" 10	
	8	Jones, P. & S. { $191 96 / 19 19 }	211 15		" 10	
M'ch	30	S. C. Griggs & Co	57 54		" 5	
Ap'l	8	Wright & B. { $345 65 / 1 72 }	343 93		" 5	
	12	Culver, P. & H.	187 38		" 7	
	16	Benson & H. { $274 65 / 1 37 }	273 18		" 8	
	18	W. B. Keen	250 00		" 10	
	19	do	102 07		Bal. 10 p. c.	
						4,365 67
			4,370 02			4,370 02

These rates of exchange are added by agreement of counsel to the account attached to the declaration, which defendant admitted was a correct list or statement of the various collections which it had made for the plaintiff, of notes sent to the defendant for collection by the plaintiff, and the plaintiffs had credit upon the
18 books of the defendant for each of said amounts and of the times or dates of making such collections. It was also admitted by the defendant that a demand for payment of these collections was made of the defendant by the plaintiff's agent on the

20th day of January, 1862, prior to bringing this suit, and payment refused.

It was also agreed by the parties that the several collections above stated were made by defendant in currency, or in such bank bills as were at the dates of the making the several collections passing current in Chicago, as and for money where defendant has its place of business, which bills or currency was, at the times it was received by defendant in payment of plaintiff's collections, of less value than coin or exchange on New York by the sums named in said account, and set opposite the several items of the same.

It was then agreed that the aggregate of collections made by defendant for plaintiff was $4,370 02 in currency, and that the value of that in coin, or exchange on New York, was $4,083 74 at the dates of collection.

Here the plaintiff rested.

19 The defendant, to maintain the issue on its part, then called T. B. Roberts, who testified he was corresponding clerk of the defendant; that he mailed, with postage prepaid, a circular directed to the plaintiff on the 10th day of December, 1860. To the reading of which circular the plaintiff objected, for the irrelevancy and incompetency, but the court overruled the objection; to which plaintiff excepted, and said circular was read in evidence, as follows :

MARINE BANK OF CHICAGO,
Chicago, Illinois, December 8, 1860.

DEAR SIR : Our late circular had reference to a probable temporary interruption of our remittances in exchange for collections made for our eastern correspondents. We find, however, that the supply of eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit,
20 in such currency as is received here, (and when payable, with exchange with the nominal rate added, unless otherwise instructed by you,) to be drawn for only in like currency.

If this course is not agreeable to you, please advise us immediately, and we will either return your collections or place them in the hands of such parties here as you may designate.

By order of the board.

HAMILTON B. DOX, *Cashier.*

The defendant then called L. C. Ellsworth, who, being duly sworn on oath, testified as follows :

I have resided in Chicago for the last ten years; my business has been that of teller in a bank. In the winter of 1860–'61 currency and bankable funds meant the notes of Illinois and Wisconsin banks. The value of the different bills varied from time to time from 2 to 40 per cent. These bills ceased to pass current on and after the 18th

day of May, 1861. In Nov., 1860, the bills of nine banks in Illinois ceased to pass as currency, and early in April, 1861, thirty more were discredited and no longer passed current. The principal
21 part of the circulation was made up of this kind of bills. Coin did not circulate, except at a premium for this currency. Not many bills of Ohio and Indiana in circulation, but they were at a premium for this currency; but these bills did not pass as currency. The witness was then asked if he had made an estimate of the value of the Illinois currency, to which he replied, that after the 39 banks had been thrown out or discredited, the average value of those which were used as currency until May 18, 1861, when the whole went down, was in the middle and last of January, 1862, about 80 cents on the dollar, and including the 30 banks thrown out in April, 1861, it was worth about 76 cents on the dollar. This estimate was based upon the quotations of the market value of the stocks deposited as security with the auditor. List of the stock was taken from the auditor's reports. There was a difference in the value of bills, owing to the kind of stock deposited; my calculation is based upon the average value of the stock of all the banks; made no calculation of the value of any particular bank bills. It was of larger value in January,
22 1862, than in May, 1861, owing to the advance in the value of stocks deposited as security. I know the usage and custom of banks and bankers is to keep all their funds together.

On cross-examination, the witness stated that the stockholders of the banks were individually liable for the bills. I did not take that fact into my estimate of the value of the bills, nor the fact of their having been personal assets. Did not estimate the value of the bills separately, but as a whole I only estimated the value of securities deposited with the auditor. In January, 1862, considerable of Illinois bills passing as currency, worth ¾ less than par; can't say the amount. The witness further it was the custom of banks and bankers to mingle all their funds, including depositors' collections and their own money. If we received money on collections which was afterwards discredited, and
23 checks were drawn for it, we should pay on the check what was current at the time the check was presented. I have no knowledge that there is any custom that the money so received is at the risk of the party receiving the collection.

H. B. Dox was then called as a witness for defendant, who, being sworn, testified that he had been engaged in banking business at Chicago, Illinois, for the last six years. I know the usage of bankers is to keep all their funds together. It would not be possible to keep them separate, so as to distinguish the funds received for each customer.

On cross-examination, the witness stated that he was cashier of the Hollister Bank, of Buffalo. They received current bank bills, gold and silver, and gave the customer credit for them. When payment was demanded, they would give good money in payment. The same thing was done in Milwaukee. They paid current funds. They could not pay out anything else, if they took it at the time

20th day of January, 1862, prior to bringing this suit, and payment refused.

It was also agreed by the parties that the several collections above stated were made by defendant in currency, or in such bank bills as were at the dates of the making the several collections passing current in Chicago, as and for money where defendant has its place of business, which bills or currency was, at the times it was received by defendant in payment of plaintiff's collections, of less value than coin or exchange on New York by the sums named in said account, and set opposite the several items of the same.

It was then agreed that the aggregate of collections made by defendant for plaintiff was $4,370 02 in currency, and that the value of that in coin, or exchange on New York, was $4,083 74 at the dates of collection.

Here the plaintiff rested.

19 The defendant, to maintain the issue on its part, then called T. B. Roberts, who testified he was corresponding clerk of the defendant; that he mailed, with postage prepaid, a circular directed to the plaintiff on the 10th day of December, 1860. To the reading of which circular the plaintiff objected, for the irrelevancy and incompetency, but the court overruled the objection; to which plaintiff excepted, and said circular was read in evidence, as follows :

MARINE BANK OF CHICAGO,
Chicago, Illinois, December 8, 1860.

DEAR SIR : Our late circular had reference to a probable temporary interruption of our remittances in exchange for collections made for our eastern correspondents. We find, however, that the supply of eastern exchange diminishes daily; the amount is altogether unreliable, and rates have advanced to 8 and 10 per cent. for such funds as are current here. We are obliged, therefore, to notify you that for the present, and until further notice, we shall place all funds received by us in payment of your collections to your credit,
20 in such currency as is received here, (and when payable, with exchange with the nominal rate added, unless otherwise instructed by you,) to be drawn for only in like currency.

If this course is not agreeable to you, please advise us immediately, and we will either return your collections or place them in the hands of such parties here as you may designate.

By order of the board.

HAMILTON B. DOX, *Cashier.*

The defendant then called L. C. Ellsworth, who, being duly sworn on oath, testified as follows :

I have resided in Chicago for the last ten years; my business has been that of teller in a bank. In the winter of 1860–'61 currency and bankable funds meant the notes of Illinois and Wisconsin banks. The value of the different bills varied from time to time from 2 to 40 per cent. These bills ceased to pass current on and after the 18th

day of May, 1861. In Nov., 1860, the bills of nine banks in Illinois ceased to pass as currency, and early in April, 1861, thirty more were discredited and no longer passed current. The principal
21 part of the circulation was made up of this kind of bills. Coin did not circulate, except at a premium for this currency. Not many bills of Ohio and Indiana in circulation, but they were at a premium for this currency; but these bills did not pass as currency. The witness was then asked if he had made an estimate of the value of the Illinois currency, to which he replied, that after the 39 banks had been thrown out or discredited, the average value of those which were used as currency until May 18, 1861, when the whole went down, was in the middle and last of January, 1862, about 80 cents on the dollar, and including the 30 banks thrown out in April, 1861, it was worth about 76 cents on the dollar. This estimate was based upon the quotations of the market value of the stocks deposited as security with the auditor. List of the stock was taken from the auditor's reports. There was a difference in the value of bills, owing to the kind of stock deposited; my calculation is based upon the average value of the stock of all the banks; made no calculation of the value of any particular bank bills. It was of larger value in January,
22 1862, than in May, 1861, owing to the advance in the value of stocks deposited as security. I know the usage and custom of banks and bankers is to keep all their funds together.

On cross-examination, the witness stated that the stockholders of the banks were individually liable for the bills. I did not take that fact into my estimate of the value of the bills, nor the fact of their having been personal assets. Did not estimate the value of the bills separately, but as a whole I only estimated the value of the stock securities deposited with the auditor. In January, 1862, there was considerable of Illinois bills passing as currency, worth ½ per cent. less than par; can't say the amount. The witness further stated that it was the custom of banks and bankers to mingle all their funds, including depositors' collections and their own money. If we received money on collections which was afterwards discredited, and
23 checks were drawn for it, we should pay on the check what was current at the time the check was presented. I have no knowledge that there is any custom that the money so received is at the risk of the party receiving the collection.

H. B. Dox was then called as a witness for defendant, who, being sworn, testified that he had been engaged in banking business at Chicago, Illinois, for the last six years. I know the usage of bankers is to keep all their funds together. It would not be possible to keep them separate, so as to distinguish the funds received for each customer.

On cross-examination, the witness stated that he was cashier of the Hollister Bank, of Buffalo. They received current bank bills, gold and silver, and gave the customer credit for them. When payment was demanded, they would give good money in payment. The same thing was done in Milwaukee. They paid current funds. They could not pay out anything else, if they took it at the time

it was current. We could not by custom pay anything else. That is the custom.

A difference was made by the banks in the credit given their customers for the different kind of funds received of them; gold or coin was credited as such, and bills of eastern banks as such, while the bills of Illinois and Wisconsin banks were entered without any such designation, or, if any, it was currency. A premium was always allowed for gold or coin and eastern funds in Illinois currency. The latter was always worth less than those. It fluctuated in value from time to time, but gradually declined in value until it became so much depreciated, that in May, 1861, it ceased to be used as currency. Until that time it was the main circulation in Chicago. The funds received by the defendant for the pl'ff were mixed with defendant's funds, from which defendants used indiscriminately in the course of its business. It was credited to the pl'ff in the books of the defendant as so many dollars. This credit expressed the number of dollars of Illinois currency received by defendant for pl'ff, and it made up a part of the general funds of the defendant while it remained in its hands. The collections made by defendant for pl'ff were made in the currency which defendant received in payment of debts to it, and paid out on its debts. It was what was generally used as currency by all persons at that time, and was chiefly made up of the bills of Illinois and Wisconsin banks. I was cashier of the defendant at the time of making collections for pl'ff. I cannot tell what bills were received in payment of the collections made by defendant for plaintiff, or any of them; the money received was mingled with our other money, and paid out in checks on us, or loaned to our customers as part of our general fund. The defendant had some of its own bills in circulation, which were always worth par in coin. There were but few of them in circulation in the winter of 1861, but were mainly kept by defendant in its own vaults. There were other banks in the State whose bills were good, but there was but few of them in circulation.

The foregoing was all the evidence in the case.

The court then instructed upon the law of the case, and among other instructions instructed the jury as follows:

That generally a bank or party receiving a note or demand for collection, in the absence of instructions, express or implied, had no right to receive anything but good money, or gold and silver, in payment; but if they believed from the evidence in this case, that defendant was authorized expressly, or by implication, by the plaintiff, to receive the depreciated currency of Illinois in payment of the notes or bills sent it by plaintiff for collection, and to place the amount to the credit of the plaintiff in the usual way, as stated by Mr. Dox, there to remain until called for by plaintiff, and that defendant did receive such currency in payment of the collections sent it by pl'ff, and mixed it with its own funds as a part of its business and banking capital, then the defendant is liable to the pl'ff for the value in coin of such currency at the times of payment, with interest from the time of demand by pl'ff for payment, unless the jury believe,

27 from the evidence, that it was the agreement, express or implied, of the parties, that any loss by depreciation of such currency was at the plaintiff's risk, in which case the plaintiff is only entitled to recover the value in coin of such currency at the date of demand for payment, with interest from that date.

To the giving of which instruction the defendant then and there excepted.

The defendant then asked the court to instruct the jury:

That if they believe, from the evidence, that the defendant was expressly or impliedly authorized by the pl'ff to receive in payment of collections for the pl'ff the depreciated currency of Illinois, in use at Chicago, and to place the amount to the credit of the plaintiff, in the way and under the circumstances stated by Mr. Dox, to remain until demanded by the pl'ff, then the pl'ff is only entitled to recover of the def't the value in coin of such currency so received by the def't at the time of demand made for payment by pl'ff, with
28 interest from that date. Which instruction the court refused to give; to which refusal of the court the defendant then and there excepted.

The jury returned a verdict for the pl'ff for the sum of $4,190.

The defendant moved for a new trial, because of alleged errors of the court in giving and refusing the several instructions above written.

But the court overruled the motion, and rendered judgment on the verdict, to which the defendant then and there excepted.

But inasmuch as the said several matters do not appear of record, the defendant prays that this its bill of exceptions be signed and sealed; which is accordingly done.

THOMAS DRUMMOND. [SEAL.]

Endorsed: Filed July 5, 1862.

WM. H. BRADLEY, *Cl'k.*

29 And afterwards, to wit, on the 15th day of July, A. D. 1862, the said defendant filed its writ of error, citation, and appeal bond, in this behalf; all of which read in the words and figures following, to wit:

Writ of error.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is before you in said circuit court, between the Agawam Bank and the Marine Bank of Chicago, a manifest error hath happened, to the great damage of the said Marine Bank of

Chicago, as by its complaint appears; and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under
30 your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this fifteenth day of
[SEAL.] July, in the year of our Lord eighteen hundred and sixty-two, and of the independence of the United States the eighty-seventh.

WM. H. BRADLEY, *Cl'k.*

Endorsed : Filed July 15th, 1862.

WM. H. BRADLEY, *Cl'k.*

31 *Citation.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the Agawam Bank, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court for the United States for the northern district of Illinois, wherein the Marine Bank of Chicago is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond this 15th day of July, in the year of our Lord eighteen hundred and sixty-two.

THOMAS DRUMMOND.

Endorsed: Served on us this 15th day of July, A. D. 1862.
WAITE & TOWNE, *Plaintiff's Att'ys.*

32 Filed July 15, 1862.

WM. H. BRADLEY, *Cl'k.*

Appeal bond.

Know all men by these presents that we, the Marine Bank of Chicago, as principal, and J. Young Scammon and Franklin Scammon,

as sureties, of the city of Chicago, Cook county, State of Illinois, are held and firmly bound unto the Agawam Bank in the sum of six thousand dollars, lawful money of the United States, to be paid to the said Agawam Bank, its assigns, and successors; to the payment whereof, well and truly to be made, the said Marine Bank of Chicago, and the said J. Young Scammon and Franklin Scammon, do hereby bind themselves, their successors, executors, administrators, and heirs, firmly by these presents, sealed with our seals and dated the tenth day of July, in the year of our Lord eighteen hundred and sixty-two. The condition of the above obligation is such that whereas the above-named Marine Bank of Chicago has presented a writ of error to the Supreme Court of the United States to reverse a judgment entered in the circuit court of the United States for the northern district of
33 Illinois, wherein the said Agawam Bank was plaintiff, and the said Marine Bank of Chicago was defendant, at the May term, A. D. 1862, of the said circuit court, and which judgment was for the sum of four thousand one hundred and ninety-four dollars and eighty cents, ($4,194 80,) besides costs of suit—

Now, therefore, the condition of this obligation is such, that if the above-named Marine Bank of Chicago shall prosecute the said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise, be and remain in full force and effect.

J. YOUNG SCAMMON,
President of the Marine Bank of Chicago.
J. M. UNDERWOOD,
[SEAL.] *Cashier of the Marine Bank Chicago.*
J. YOUNG SCAMMON. [SEAL.]
F. SCAMMON. [SEAL.]

Endorsed: Approved.

THOMAS DRUMMOND.

Filed July 15th, 1862.

WM. H. BRADLEY, *Clerk.*

34 *Northern District of Illinois, ss:*

I, William H. Bradley, clerk of circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in the cause wherein the Agawam Bank was plaintiff and Marine Bank of Chicago defendant, as the same appears from the records of said court now remaining on file in said court.

In testimony whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at office in Chicago, this 1st day of December, A. D. 1862, and of the independence of the United States the 87th year.

WM. H. BRADLEY, *Clerk.*

35 *Errors assigned.*

And now comes the said p'ff in error and assigns the following errors upon the foregoing record:

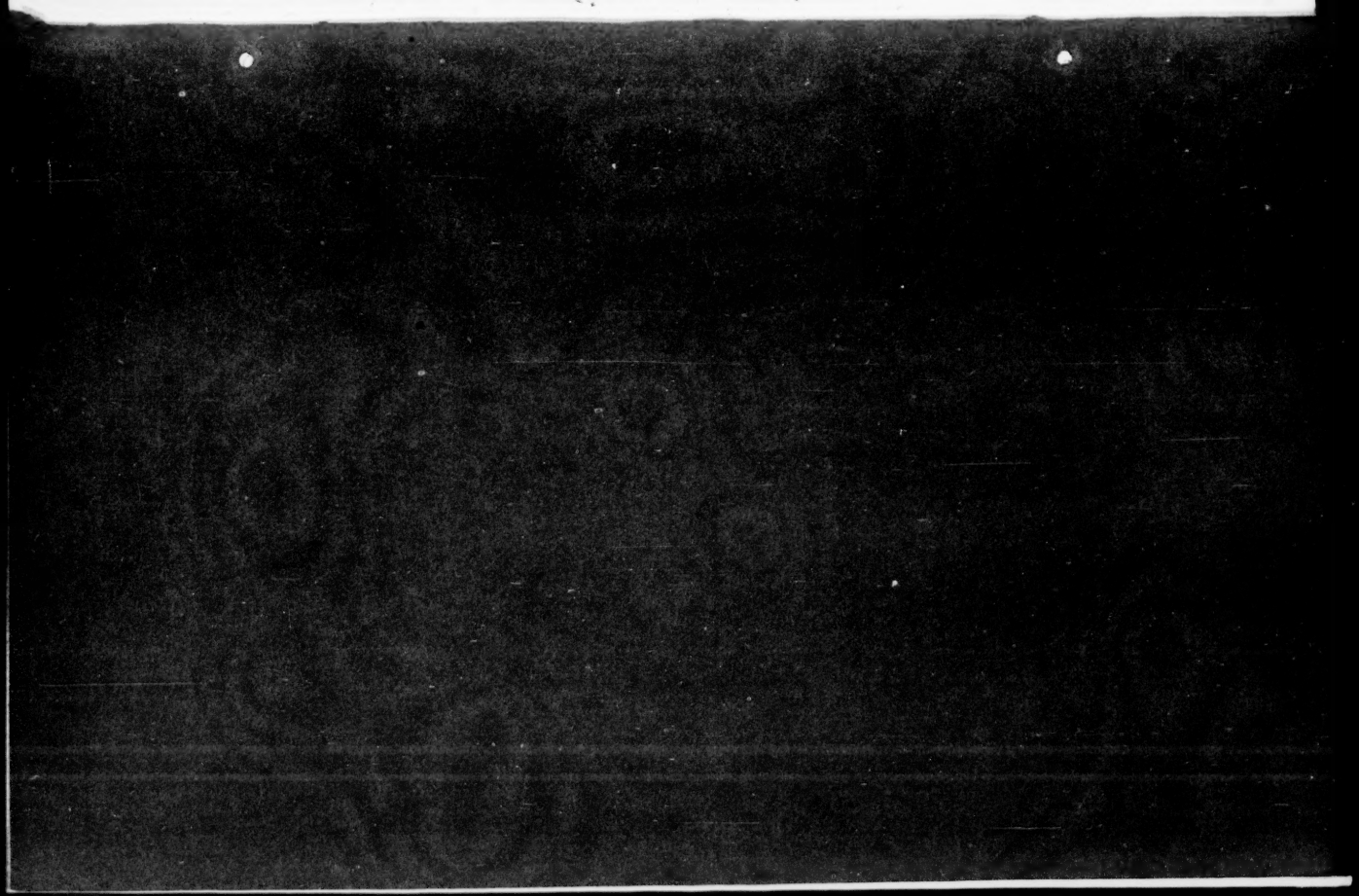
1. That the court erred in giving the instruction for the deft. in error above set out and excepted to.
2. That the court erred in refusing the instruction asked by the p'ff in error.

By its counsel.

SAM. W. FULLER.

Dec. 18, 1862.

Filed 6 Dec., 1862.



IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1863.

No. 194.

THE MARINE BANK OF CHICAGO,

Plaintiff in Error,

— VS. —

AGAWAM BANK,

Defendant in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

THO. HOYNE, *for Plaintiff in Error.*

Hon. S. W. FULLER, *of Counsel.*

CHICAGO:

BEACH & BARNARD, PRINTERS, 14 SOUTH CLARK STREET.

BRIEF AND ARGUMENT.

The nature of the controversy in this case is, in all material particulars, so like the last case submitted to the court (*Marine Bank* vs. *Broadway Bank*, No. 193) that anything like a full argument upon the points and authorities would seem a tiresome and unnecessary repetition of the same brief and argument submitted in that case.

We will, therefore, content ourselves in this case by such a brief summary of the facts and points in controversy, as will show the nature of the case, and the analogies existing between the last record in 193, and the present case, 194.

The defendant in error in this case was also a banking corporation in Massachusetts, and sent, between the 1st of February and 1st of May, 1861, to the plaintiff in error, a bank in Chicago, a large amount of bills, notes and demands, for collection in Illinois. These demands were collected in a depreciated circulating medium, commonly known as "Illinois currency," passing current as money in payment of debts among all business men in that State.

Mr. Dox, on page 12 of the record, states the character of this currency, so well known as "*Illinois currency*," and that a difference was made by the banks in the credit given their customers for the different kinds of funds received of them. Gold or coin, he says, was "credited as such, and "bills of Eastern banks, as such, while the bills of Illinois "and Wisconsin banks were entered without any such "designation; or if any, it was currency. A premium "was always allowed for gold or coin, and Eastern funds,

" in Illinois currency. The latter was always worth less " than those. *It fluctuated in value from time to time, but* " *gradually declined in value until it became so much de-* " *preciated, that in May*, 1861, *it ceased to be used as a* " *currency.* Until that time it was the main circulation in " Chicago. * * * * * * The collections made by " defendant for plaintiff were made in the currency which " defendant received in payment of debts to it, and paid " out on its debts. It was what was generally used as " currency by all persons at that time, and was chiefly " made up of the bills of Illinois and Wisconsin banks," &c.

It is shown, that the average value of notes of Illinois and Wisconsin banks, in January, 1862, when a demand was made upon the debtor bank (plaintiff in error) for the amount of the collections made, was about 80 cents on $1, and the calculation was based upon the average value of the stock of *all the banks* which had a circulation up to May, 1861, without reference to the value of any particular bank bills in which there was a difference, owing to the kind of stock deposited. (See testimony of Ellsworth, Record, page 11).

The usage of the banks in Illinois was shown to be, to collect demands in current bank bills, and keep all funds so received of a like kind together; for, as Mr. Dox testifies (page 11), it would not be possible to keep them separate, so as to distinguish the funds received for each customer; and, as he says, he cannot tell what particular bills were received in payment of the (defendant in error's) collections.

The entire account of these collections is made up by agreement of parties (see Record, p. 9), showing $4,370.02 collected at different times, of which the value in coin, estimated at the different dates when the several collections were received, to be $4,083.74; for which, under the in-

structions of the court below, the jury rendered a verdict, including interest, for $4,190.00.

In this case, also, as in case 193, the plaintiff in error proved the sending of a circular to defendant, dated Dec. 8, 1860, although no letter acknowledging its receipt by defendant was proved.

This circular was mailed to defendant in error on the 10th of December, 1860, in the Chicago post office, postage pre-paid (see Record, page 10), and is as follows:

[COPY OF CIRCULAR.]

"MARINE BANK OF CHICAGO.

"*Chicago, Ill., Dec.* 8, 1860.

"DEAR SIR:

"Our late circular had reference to a probably "temporary interruption of our remittances in Exchange, for collec- "tions made for our Eastern correspondents.

"We find, however, that the supply of Eastern Exchange dimin- "ishes daily; the amount is altogether unreliable, and rates have "advanced to 8 and 10 per cent. for such funds as are curren here. "We are obliged, therefore, to notify you that for the present, and "until further notice, we shall place all funds received by us in "payment of your collections to your credit, in such currency as "is received here, (and when payable with exchange, with the "nominal rate added, unless otherwise instructed by you,) to be "drawn for only in like currency.

"If this course is not agreeable to you, please advise us imme- "diately, and we will either return your collections, or place them "in the hands of such parties here as you may designate,

"By order of the Board.

"HAMILTON B. DOX, CASHIER."

The court instructed the jury, "that generally, a bank "or party receiving a note or demand for collection, in the

" absence of instructions express or implied, had no right " to receive anything but good money or gold and silver in " payment; but if they believed, from the evidence in this " case, that defendant was authorized, expressly or by im- " plication, by the plaintiff to receive the depreciated " currency of Illinois in payment of the notes or bills sent " it by plaintiff for collection, and to place the amount to " credit of plaintiff in the usual way as stated by Mr. Dox, " there to remain until called for by plaintiff; and that " defendant did receive such currency in payment of the " collections sent it by plaintiff, and mixed it with its own " funds, as a part of its business and banking capital, then " the defendant is liable to plaintiff for the value in coin " of such currency at the times of payment, with interest " from the time of demand by plaintiff for payment, *unless* " *the jury believe, from the evidence, that it was the agree-* " *ment, express or implied, of the parties, that any loss by* " *depreciation of such currency was at the plaintiff's risk;* " *in which case the plaintiff is only entitled to receive the* " *value in coin of such currency at the date of demand for* " *payment, with interest from that date.*"

The court, it will be seen, instructs the jury that although the plaintiff in error was, expressly or by implication, *authorized to receive for their principals the depreciated currency in payment of the bills and notes sent them for collection, and to place the amount to the credit of the defendant in error in the usual way*, there to remain until called for by them, yet that unless there was also a still further agreement that the risk of a further depreciation was assumed by the principal (defendant in error), that then the defendant in error might recover the value of the currency *at the time it was received* by plaintiff in error, and not *at the time it was demanded* of them.

The plaintiff in error insisted at the trial, and does now insist, that their instruction, which was refused by the court, contained the true principles of law governing this case, viz:—

"That if the jury believe, from the evidence, that the "plaintiff in error was so authorized as stated, to receive, "in payment of the collections the depreciated currency of "Illinois, and to place the same to credit of defendant in "error, to remain until demanded by them, that the plaintiff "below was only entitled to recover of defendant the value "in coin of such currency so received by the defendant, at "the time of demand made for payment, with interest from "that date." (Record, page 13).

On the giving and refusing of the above instructions depend the questions raised for the consideration of this court.

These questions are—

1st. The extent of the liability which the agent (plaintiff in error in this case) incurred in dealing with the business of the principal (defendant in error), under these circumstances.

2nd. The rule of the measure of damages, in case there was a breach of duty or default established against the agent.

3rd. The question of "currency funds," nature of the contract, mixing of funds, and the money counts which are incidental to the two first questions raised.

I.

This court has had occasion to repeatedly decide that the transmission of bills by one bank to another for collection, establishes the relation of principal and agent between them, and that the agent in such cases is held to the dis-

charge of all reasonable care and diligence; for, says Chief Justice MARSHALL, in case of *Bank of Washington* vs. *Triplett*, 1 Peters, 31, "the liability of the bank for the "bill placed in its hands for collection, depends on the "question whether reasonable and due diligence has been "used in the performance of its duty," and they hold in this case that the settled usage of the banks at the place of collection is to be followed in the absence of any specific instructions.

Bank of Washington vs. *Triplett*, 1 Pet., 25;
Mells vs. *U. S. Bank*, 11 Weaton, 431;
Wilson vs. *Smith*, 3 How., 763.

And in following instructions or the diligent discharge of duty, the rule of law is universal, that if any loss occurs the principal must bear it, and not the agent.

2 Parsons on Cont., 73;
Story on Agency, sec. 202;
Parson's Mercantile Law, 144.

And Judge STORY, in his work on Agency, sec. 202, expressly alludes to such a loss as has become the subject of the controversy at bar, when he says, "that if payment "is received in the usual manner of conducting like busi- "ness transactions, as by receiving a check from a person "in good credit, who should become insolvent before it "was presented, or by receiving the common currency of "the country, which should afterwards become depreciated, "in each of these cases the loss would be that of the prin- "cipal and not that of the agent."

Now, according to the circular of Dec. 8, (Record, p. 10) and which was mailed to defendant in error, they were, as bankers, advised of the real and actual condition of the currency in Illinois, in which their collections, if sent, were to be made. They knew in February (1861) afterwards,

when they commenced sending their bills and notes for collection, that the currency was so depreciated then as to be below exchange on New York *eight* and *ten* per cent.; (an unprecedented rate of discount in the West for Eastern funds to be remitted); they knew that even at these rates the supply was diminishing daily, and that, until further notice, all funds received for collections must be placed to their credit, in such currency as was received in Chicago, *to be drawn for only in like currency*, and if this course was not agreeable to them to advise the plaintiff in error immediately, and they would return the collections sent, or place them in other hands, such as defendant should designate, &c.

What could have been more explicit as matter of advise to the principal as to the conditions only upon which the agent bank would accept any agency of collection? Upon such conditions only the principal accepted the service of the agent and sent the collections. And shall the court require, after the service so accepted was entered upon, that after a loss had occurred in the usual and ordinary mode of transacting the like business, in conformity to the common usage of all banks and bankers, according to the specific conditions named in the circular of advise, without any imputation of bad faith or want of diligence in the discharge of his duties, that now the agent must be held responsible for the very consequences of the disaster to the currency which he had, perhaps, foreseen, and attempted to provide against, unless he shows also that the principal expressly or impliedly undertook all risks of a further loss on the depreciated currency he was instructed to take, and did take, and hold, and keep for him? The agent bank had warned the defendant in error, and, by the circular of Dec. 8, told them that the currency was in a tottering and failing

condition, and must sooner or later reach the "crisis" which was to take place, and which accordingly did take place in May, 1861. Yet we are told by the instruction that the law is, that though we were fully authorized to act as we did, and that, having acted in good faith, with all diligence, we must now bear a share of the losses against which we had protested in advance, because we do not also prove that the principal in this case had agreed to bear *his own risks and losses in the business which we only transacted as an agent upon his account.*

We humbly submit that this part of the court's instruction below was a "*non sequitur*" from that which preceded it. Admit the relation of principal and agent to be established, and that we had acted upon instructions or by authority in receiving the currency, and that a loss followed growing out of the transaction of the business without our fraud or default, and then it *must follow*, as a rule of law, that without further agreement or condition whatsoever, the loss is that of the principal, and not that of the agent, and so the jury should have been instructed to find the value of the currency received at the time of the demand and refusal to pay, and not at the time when the collections were made.

These considerations, materially affecting the rights of both parties, are increased in force by the consideration that the currency in which they were dealing, as bankers, was a *depreciated* and *irredeemable currency*; that as shown in brief in case 193, p. 13, the banks which issued it were then and had been in a state of insolvency and suspension; that their bills were nothing more than *discredited unpaid promissory notes, or "choses in action,"* and not money, coin, or the equivalent of money or coin; that they were nothing more, in any legal sense, than a commodity, a kind of asset and property fluctuating in market value

from day to day, and the value of which depended on, sometimes, political causes, and sometimes, financial speculations in the stock market, affecting the value of the stocks upon which the circulation depended for its security.

The plaintiff in error, acting merely as agent under the circumstances, has been treated as if, in some way not explained, it had an interest or consideration to guarantee, and had become responsible, as guarantor, for the steadiness of the market value of this *commodity*, or currency, after they had received it on the defendant in error's account, and that no greater depreciation should take place after that time. It will now be easily understood how unjust, unreasonable and without known precedent, according to the principles of any civilized code of jurisprudence, such an assumption appears to us when it is considered that the plaintiff in error, acting as agent, received the proceeds of the collections subject to the conditions of their circular of Dec. 8; as agents that they received, on account of the principal, depreciated bank notes; kept it in the same kind of depreciated funds as received for the principal; followed all the usages and custom of bankers in keeping and collecting such funds; followed, besides, the letter of authority conferred in sending the collections credited to their principals, promptly, the amounts as they were received, and then kept and held it subject to their order and demand, in like funds, according to all the conditions prescribed by the circular of Dec. 8, 1860, (p. 10 of Record); and we submit, therefore, that under any circumstances, the defendant in error was entitled to no more at the date of demand than they could have received for the same currency had they made the collections themselves, which, as agents, we made in their behalf.

II.

The second branch of the argument is so much involved in what has been said already, as to the instructions, that it is scarcely necessary to speak of a rule of damages in case of default.

We hold, in our former brief, in case 193, that the subject of this contract between the parties was not a mere *money* obligation, because money was not the subject of the dealing or collections between the parties, but a *commodity*, an asset of fluctuating value, known as "Illinois "currency," otherwise branded, by business men in Illinois, after its utter failure and repudiation in circulation, as "stump-tail." That the collection in this "stump tail" cannot be treated as "money," and that upon a liability arising to pay any number of dollars *in stump-tail* money, the measure of damages must be the *real value* of the number of that kind of securities and not the *nominal* amount of them. "The cash value of the thing is the true amount "of the debt to be discharged."

Smith vs. *Dunlap*, 12 Ills. 184;
Anderson vs. *Erwing*, 3 Littell, 245;
3 Humph. R. 171;
14 Ills. R. 105.

Mem. See brief in case 193 for full citation of cases. *Marine Bank* vs. *Broadway Bank*, p. 17, 13.

III.

But the *mixing* of the particular funds collected is again relied upon as if it had been possible, in a general banking business, to keep a special deposit account with each package of money received and then tender it to a customer.

Mr. Dox (p. 11 of Record) states distinctly the *custom and usage* of bankers, upon this point, and says, "It would not be possible to keep them separate, " so as to distinguish the funds received for each customer."

We insist, therefore, that according to the nature of the relation existing, and its duties, we were, as agents, acting according to the general usage and custom of bankers, which the plaintiffs below, as bankers themselves well understood and knew, and that this custom and usage must be taken as a part of the contract to regulate the liabilities and duties of the parties to it.

It was, at any rate, a *mixture by consent*, and in such cases the courts all say there is no wrong, and the utmost which the principal owner can claim is his "*aliquot* share," or interest in the entire mixture, which is the substance of what we offer in insisting upon the average value of the whole of what constituted "Illinois currency" at the date of the demand.

It is readily seen, that in this mode of estimation, while the principal gets, in any event, the highest value of his aliquot share, he might realize much less had the packages of particular collections been set aside for his use in the particular bank bills received, while some of the banks commanded as high as 90 per cent., others again rated as low as 25 per cent., the value of their issues depending on the value and kind of securities deposited with the Auditor, and thus a special account with each package of bills received, instead of with the whole mass, for each general customer, might have operated special and general injustice, as not being according to the general usage and understanding of any one dealing with the currency at the time, while it was utterly impracticable.

Story on Bailments, sec. 40;
Low vs. *Martin*, 18 Ills. 287.

We submit that, in this case, it can therefore make no difference, and the action being in assumpsit for money due, and not upon any special contract, or in case for the injury, the doctrine of confusion or mixture can have no application whatever.

THOS. HOYNE.

HON. S. W. FULLER,

Of Counsel.

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"*Chicago Post*" *Print.*

IN THE SUPREME COURT

OF THE

UNITED STATES.

MARINE BANK

vs.

THE AGAWAM BANK.

ARGUMENT FOR THE APPELLEE

This was an action brought by the appellee to recover certain sums collected by the appellant, a bank doing business in Chicago, for the appellee, a bank at Springfield, Massachusetts. The accounts showing collections from February 13th, 1862, to

April 19th, 1862, by agreement was read in evidence as a true statement of the account, upon which was placed the rates of exchange at the times of the collections, which varied from five per cent. up to ten; coin and exchange being equivalent.

These were notes sent to appellant to collect, and the appellee had credit upon the books of the appellant for each of the several amounts at the times they were collected.

It was also admitted that a demand was made for the payment of the same January 20th, 1863, and prior to the bringing of the suit, and payment refused. It was also admitted that the collections were made by the appellant in currency, or such bank bills as were at the dates of the several collections passing current in Chicago as and for money, and were of less value than coin or exchange. That the aggregate of collections was $4370.02, and the value in exchange or coin at the date of collections was $4083.74.

The appellant called *T. B. Roberts*, who testified that he was clerk in the Marine Bank, and he mailed to the Agawam Bank a circular dated Dec. 8th, 1861, but it does not appear that the appellee ever received it. To the reading of which the appellee objected, but the objection was overruled, and it was read in evidence.

They then called *L. C. Ellsworth*, who testified that he was teller of the Marine Bank. That in the winter of 1861–62 currency and bankable funds meant Illinois and Wisconsin bank bills. These ceased to pass current as money after May 18th, 1862. In Nov., 1861, nine Illinois banks, and early in April, 30 more Illinois banks ceased to pass as currency. Coin, Indiana and Ohio money did not pass except at a premium. That he had made an estimate of the value of Illinois currency. That the average value after throwing out the 39 banks was 80 per cent.,

including the 30 thrown out in April, 76 cents on the dollar. This estimate was based solely upon the average value of the stocks securing the bills; made no calculation of the value of any one bank. Nor did he consider the assets of the banks, or the individual liability of the stock holders, who were liable for the bills.

In January, 1863, (the time of the demand), there was Illinois money in circulation worth ½ per cent. less than gold. That it was the custom of bankers to mix their funds all together, including deposits and collections. That if they received money on collections, which was afterwards discredited, and checks were drawn for the collections, they always paid on the checks what was good at the time the check was presented.

H. B. Doe, called by appellant, testified that he was the cashier of the Marine Bank. That banks always mingled their funds together. They received current bank bills; when payment was demanded they gave good money; they could not pay out anything else, if it was good at the time they received it; that else Illinois and Wisconsin bills were the main circulation in Chicago. They fluctuated in value from time to time, till they became so depreciated on May 18th, 1863, they ceased to pass as currency. A premium was always allowed for eastern money or gold. The funds received by the appellant for the appellee's collections were mixed with their other funds and used indiscriminately in the course of their business, paid out on checks and loaned to their customers. The appellee had credit upon the appellant's books "as so many dollars," and it made up a part of the general funds of the bank. The collections were made in the currency that the Marine Bank received and paid out in payment of debts. It was what was generally used as

currency by all persons at that time. Could not tell what bills were received in payment of the collections made for the Agawam Bank.

The Marine Bank had some of its own bills in circulation, which were always worth par in coin. There were but few of them in circulation in the winter of 1861. There were a few other banks whose bills were good, but they had a small circulation.

It did not appear how much, if any, of the money of the Illinois Banks the appellant had on the 18th of May, or that they met with any loss by the same.

A verdict was rendered for the appellee for $4194. This was the coin value of the money at the time of the collections, with interest from the date of the demand.

The only error assigned is in giving and refusing instructions. If any one has reason to complain of the instructions given it was the appellee and not the appellant, as they were clearly entitled to recover $4370.02, instead of $4083.74.

We have discussed in the case of the Marine Bank vs. the President and Directors of the Western Reserve Bank, No. 195 of this docket, the relation and liabilities which the Marine Bank assumed in making the collections. And we have proved from the authorities that they became the debtor of the Agawam Bank, and were bound to pay good money when called upon for the same. To the authorities there cited and the argument made we call the attention of the Court, without here again repeating the same.

There is in this case what there is not in that, the circular of the 8th of December. What effect that circular can have upon the case we fail to see. It refers to a previous circular—what that was we do not know. This one is that exchange is

scarce, and rates have advanced to 8 or 10 per cent., and they therefore give notice of what? that they "*shall place all funds received by us to your credit in such currency as is received here, to be drawn for only in like currency.*" They were willing to give credit for the money—to become the debtor—and were willing to pay, in such currency as is received here, when called for.

Now it is evident from that circular that the Marine Bank became the debtor. If so the money they received was at their risk, and they were bound to pay good money when called upon. They did not say the money is at your risk, nor did they say we will keep the money seperate, in the bills we received; but we will become your debtor for the money. There is no other construction can be put upon it. It therefore becomes like any other case of debtor or creditor.

They say to be drawn for only in like currency—not in the bills which are paid us—but in such currency as is received here. That is in what passes as and for money, which in the barter of the world represents dollars. The currency which the world receives and pays out. Now what is that? The commercial world understands it to be what represents money, as that which passes from hand to hand, pays debts, buys merchandise, is loaned out and is received on deposit.

The common paper money of the country, really only worth the paper on which it is written, but passing as the representative of a dollar, some times at one per cent. discount, at another five per cent. discount, but all the time passing from hand to hand as money. Take an instance the circulating medium of the community called currency, is made up of forty banks, suddenly ten of them are thrown out, they may be worth just as much as before, but in as much as they cannot be used in channels of trade,

to buy and pay debts, they cease to be currency, the other thirty still continues to be currency. Would any one think of offering to pay a debt, or to buy an article with the bills of one of the ten suspended or discredited banks? Not at all. Why the commercial world rejects them as currency. This same rule prevails whether one or thirty of the forty banks fail.

The demand in this case was made in January, A. D. 1863. Ellsworth, their witness, says that "there was considerable of Illinois bills passing as currency"; and worth a half per cent. discount for specie.

Now by that circular they were bound to pay such currency as was received here when called for. It certainly cannot mean anything else. Yet the argument of the appellant says, "that it means to pay in broken bank bills, which no one received as money; which they did not receive as money; because these bills had once been currency.

Their construction omits a part of the circular, to-wit: that which is received here, and the word currency. The bills of a broken bank lack both, for they are not received as currency, or are they in fact currency. Neither the law or the commercial world, or the appellant treated them as such. Now such a circular as this is to receive such a construction as will make sense of it, and if possible every word in it is to be included in that construction, and no word if possible to be excluded. Could it for an instant be contended, that if one bank failed that the appellant was bound to take the bills of that bank? Even the appellant ignores that. Why? Because it ceases to be currency. Wherein is the difference between the failure of one bank and thirty? They both lack the element of currency, neither passes as money. Now when these collections were made and the appellant gave the appellee credit, the appellant treated it as mon-

ey, they dealt in it as such, and when so treated the law deems it such. [9 Peters R. 378, 400. 4 Florida 404. 9 Indiana R. 137–8. 1 Metc. R. 156–9. 21 Ill. R. 247. 10 Misso. R. 519. 4 Mass. R. 245. 6 Mass. R. 182. 7 Misso. R. 595.]

And Story, Judge, in 10 Wheat. R. 127, says, "Bank notes constitute a part of the common currency of the country and ordinarily pass as money. They are received as payment, the receipt is always given for them as money. They are good tender as money unless specially objected to."

3rd Term R. 554. 1 Metc. R. 159.

Even if bills which are at a large discount are loaned as money, no question of usury can be raised. [9 Peters R. 400. 4 Florida R. 404. 9 Ind. R. 136,] and if this is so it disproves of the argument based upon the claim that we knew that they were at a discount.

Now what is the meaning of currency? The popular and commercial and legal meaning coincide. Wharton Law Lex. says, "Currency is bank notes or other paper money, issued by authority, and which are continually passing as and for coin."

And in the case of Judah vs. Haines, 19 John. R. 144, when a note was payable "*in bank notes current in the city of New York,*" it was held to mean any funds current in the city of New York, whether New York, New England or other banks. And in Keith vs. Jones, 9 John. R. 120, the words "payable in State bills or specie, meant lawful current money of the State."

And Lord Mansfield held them in 1 Burr R. 457, "not mere securities or documents for debts, but such as are treated as money in the ordinary course and transaction of business by the common consent of mankind."

In Swift vs. Whitney, 20 Ill. R. 144, when a certificate of deposit was payable "in currency," the Court says, "*by the term*

currency is understood bank bills, or other paper money issued by authority which passes as and for coin."

And in Chicago Marine and Fire Insurance Company vs. Keiron, 28 Ill. R. 501, a certificate of deposit payable in "Illinois currency," could not be satisfied by depreciated paper; it must be met by bills passing in the locality in the place of coin." See also, 21 Ill. R. 101. 1 Ohio R. 86. 9 Peters R. 400. 28 Ill. R. 460. 1 Dallas R. 125.

Therefore the circular is that they will receive that which passes as and for coin, and give credit for the same, and pay in that which passes as and for coin when the same is checked for. This they refuse to do. Currency or that which passed as and for coin was when the same was call for ½ per cent. discount, or in other words better than when they gave credit for the same.

Now their theory is, that in as much as the volume of currency which was in circulation at the time the demands were collected, has failed, or in other words, has ceased to be currency, therefore they are only liable to give the bills of broken banks or their value. As we have said before, to do this, they must ignore a part of their own circular; they must strike out the word currency in the conclusion of the circular, and insert words which have a contrary meaning; that is, "we will pay in broken bank bills"; which neither they nor any one else receives as currency.

Now it would be absurd to say that either party anticipated any such thing, or so understood the circular. They did undoubtedly understand it, as meaning that which is currency in the community when you call upon us for the payment of that for which we have given you credit.

They in their argument entirely ignore the fact of credit; the relation of debtor and creditor, and claim to apply the doc-

trine of bailment. How the doctrine of bailment, or that the money was at risk of the appellee is compatable with the appellant's use of the funds, or that the fact that the apppellee had credit, and also with the fact of their having mingled the funds we fail to see. That the specific bills received might have been at the risk of the appellee must be admitted; but as Judge Cowen says, in 17 Wend. R. 101, "such is not the course of business or the law, and they must have done entirely different from what was done in this case." They in their argument feel the force of their giving credit, and of the mixing and using the funds. And well they may, for the mixing of the funds by the agent in Robinson vs. Ward, 12 Eng. C. L. R. 450, was the hinge of the case by which he was made responsible, and that case has ever since been held law. And in the matter of Stafford, 11 Barb. R. 354, it was extended to the case of a mere naked trustee. And Judge Harris, in reasoning the case, likens it to a bank, "who receives from its customer money, and passes the same to his credit, it is called a deposit, but its legal effect is *a loan*. The bank credits the amount to his depositor as a debt which it owes him. Nothing short of payment will absolve the bank from the obligation it assumes."

And because the trustee in that case had deposited the funds in his individual accounts, that is, mixed the funds, he became a debtor of the estate. And in 1 Paige C. R. 393, 402, the Court says, "Executors and trustees must be made to understand that that it is their duty to keep the funds of the trust separate and distinct from their own funds and business. That they should upon no consideration, use the trust money themselves or permit it to be mingled with their own moneys or property."

To the same effect is Paley on Agency 47; 7 Sim. R. 178; Story on Agency, 47, 228.

To escape this known principle, the appellants seek to shield themselves under a usage. Now the proof does not establish that they do not assume the risk by such acts.

Now both of appellants' witnesses fail to prove any facts, which will establish a custom; but on the contrary, admit their liability to pay good money when called for. They say "it is the usage of banks to keep their funds together." And why? because the money is at their risk. Says Walker, Judge, under similar circumstances, in May vs. Tuskegee Insurance Co., 34 Ala. R. 63, "It constituted the former the debtor of the latter to the amount of the deposit, creating an obligation to pay upon demand or upon the check of the latter, without interest. Such a deposit is a gratuitous loan, and it makes the depositor a creditor and the depositary a debtor." And Edwards on bailments Paige 66, says, "if money is deposited with a bank in the ordinary course of business, it does not create a contract of bailment, it is a loan without interest, and creates the relation of debtor and creditor; the bank receives the money deposited and agrees to repay the money on demand, at all events the fund is mingled with other moneys and becomes an absolute debt due from the bank for which it is liable at all events, even though the money be lost, without any fault on their part." He goes on to add, "*If kept distinct and specially receipted for it might create the contract of bailment.*"

It being therefore a gratuitous loan, they had a right to mingle the funds and use them. The custom, as admitted by their witnesses, to pay good money when called for is in harmony with the law.

But we fail to see wherein they would be the gainer to treat them as bailees of this money, the using the money, mingling the same with their own, is in law a conversion: [44 Maine R.

491 and 152; 19 Conn. R. 327; 3 B & A 687; (5 E. C. L. R. 422); 8 Taunt. R. 237; 4 Taunt. R. 99; 10 John. R. 174; 10 Mass. R. 128; 5 Mass. R. 104; 1 Metc. R. 31; 10 Cush. R 418; 37 Maine R. 290.]

And in such case the plaintiff can recover the value at the time of the conversion with interest: [26 Conn. R. 483; 26 Barb 650; 13 Gray R. 313; 2 Mason R. 84; 17 Pick. R. 21; 14 Pick. R. 356; 8 Pick. R. 9; 1 Metc. R. 172; 8 Bibb. R. 175.]

And by many Courts, when property is fluctuating in value, it has been held that the plaintiff at his election can recover the highest value at the time of its conversion; or at any time up to the time of bringing suit; [9 Cal. R. 562; 3 Camp. R. 476; 26 Ala. R. 213; 6 Ala. R. 345; 9 Ala. R. 149; 10 Ala. R. 688; 20 Ala. R. 694.]

And not a case can be found in which we should be limited to the average value of the plaintiff's and defendant's property mixed together. The absurdity of such a rule is apparent, when it ignores two elements of value in the bills, the individual liability of the stock holders, and the assets of the banks.

They say they cannot tell what bills were received in payment of these collections. For aught we know they were the bills of banks having stockholders abundantly able to pay the face of the same; and in the absence of all proof on the subject, we have a right to so presume. At all events we have a right to try and collect it from the stockholders, as well as to take the stocks on the bills and sell them at the brokers' board. And it is a noticeable fact, that while they prove that Illinois and Wisconsin money constituted the bulk of the currency, it does not appear that the Wisconsin banks have all failed, on the contrary the facts are they did not fail; nor did all the Illinois banks cease

to pass as currency, but only a part of them. All these questions have been settled against the appellant by the Illinois Court, and in every instance they have been charged with the whole amount of the credit. See 28 Ill. R. 360, 90, 463; 27 Ill. 525, 506.

We have gone upon the assumption that the circular of the 8th of December was received by the Agawam Bank, as we do not conceive it makes any difference in the case. In point of fact they never heard of it. There is no evidence to connect them with it except the mere mailing.

Further, if Wisconsin and Illinois money was currency, why not estimate the value of Wisconsin currency.

The instructions given in this case, are clearly law, and are fully sustained by the above citations. The refused instructions are not sufficient by either evidence or law.

We would further add, that Illinois and Wisconsin money, or what the currency was that was received here was not mentioned in the circular. It is simply "such currency as is received here." How could the Agawam Bank know what that was? The circular did not advise them. There is no proof in the case that they knew. They resided more than a thousand miles away. The fact that currency meant Illinois and Wisconsin banks in Chicago, was never communicated to them in any manner. They would naturally understand by "such currency as received here," such as passed as and for coin. It did with Agawam Bank in Massachusetts. It does by the law of the land?

The local meaning to a certain word or a local custom cannot bind or effect the case, unless a knowledge is carried home to the Agawam Bank, for how can parties contract in reference to that of which they have no knowledge. [9 Pick. R. 201; 2 Wend. R. 501; 2 Scam. R. 366.]

The meaning of a word for a few weeks or months certainly cannot create a valid and ~~standing~~ usage. Nor will such use control the general commercial law of the land, for the rules defining the rights and obligations of parties should be known, uniform and stated.

See 25 Wend. R. 675, decided by Judge Nelson; approved in 6 Hill R. 174 and 18 Barb. R. 291; also see 2 Burr R. 1216, 1222; 2 Sum. R. 567; 2 Wash. R. 24 & 7; 14 Pick. R. 144; 1 Story R. 603.

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